

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Revocation
of the Family Child Care License of Joni
Wynia

**ORDER ON MOTION
TO EXCLUDE EVIDENCE**

On June 13, 2008, Counsel for Joni Wynia (Licensee, Respondent) filed a Motion to Exclude certain evidence.

On July 8, 2008, Counsel for the Department of Human Services (Department) and Rock County Family Services (Local Agency) filed a Response to the Licensee's Motion.

On July 13, 2008, Counsel for the Licensee filed a Reply to the Response of the Department and the Local Agency.

James D. Fleming, Esq., Maschka, Riedy & Ries Law Firm, 201 North Board Street, P. O. Box 7, Mankato, MN 56002-0007, represents the Licensee/Respondent, Joni Wynia. Donald R. Klosterbuer, Esq., Rock County Attorney, 120 North McKenzie, P. O. Box 538, Luverne, MN 56156-0538, represents the Department and the Local Agency.

Based on the filings and arguments herein, the Administrative Law Judge (ALJ) makes the following:

ORDER

IT IS ORDERED that the Licensee/Respondent's Motion to Exclude Evidence is **GRANTED, IN PART** and **DENIED, IN PART**, in accordance with the accompanying Memorandum, which is incorporated by reference herein.

Dated: July 25, 2008

s/Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

MEMORANDUM

The Motion filed by Counsel for the Licensee/Respondent requests an Order from the Administrative Law Judge, as follows:

1. Preventing the Commissioner of Human Services from offering the tape recorded statement of J.R., date of birth 7-22-99, and also prevent the Commissioner of Human Services from offering the typed transcript of the same statement which was taken on July 17, 2007...on the following grounds:

- (a) The statement is hearsay.
- (b) The statement is not reliable in that they did not follow the necessary protocols for interviewing child witnesses...
- (c) Dr. Linda Marshall (Respondent/Licensee's expert) provided that also that the statement was not reliable in that the questioning of J.R. was highly suggestive.
- (d) J.R. is an incompetent witness as defined by Minn. Stat. § 592.02 in that this child is under the age of 10.

2. Preventing the Commissioner of Human Services from offering the direct testimony of J.R., date of birth 7-22-99, and that J.R. is under the age of 10 and is presumed to be an incompetent witness pursuant to Minn. Stat. § 595.02. Minn. R. 1400.8607, subp. 1 states that evidence which is incompetent shall be excluded.

3. Preventing the Commissioner of Human Services from offering any evidence on the April 18, 2007 injury to A.R.'s leg as irrelevant. The injury to A.R. was not the result of any action done by Joni Wynia. In the Temporary Immediate Suspension Order signed by Judge Snell on September 17, 2007, and the following Order affirming the Findings of Judge Snell of December 10, 2007 by the Commissioner of Human Services interpreting the September 17, 2007 Findings, it was found that the injury to A.R.'s right leg did not occur at the Wynia home. The only finding was that Joni Wynia had discovered the injury to A.R.'s right leg. Said evidence is irrelevant and should be excluded....

In his response to Ms. Wynia's Motion, Counsel for the Department and the Local Agency states that the County does not intend to introduce evidence relating to the April 18, 2007 injury to A.R.'s leg. Counsel adds that no objection is made as to the Licensee/Respondent's third request. As a result, the Licensee/Respondent's Motion to Exclude Evidence is granted with respect to any evidence regarding the incident of April 18, 2007.

Minn. Stat. § 595.02, subd. 1(m) provides:

"A child under ten years of age is a competent witness unless the court finds that the child lacks the capacity to remember or to relate truthfully

facts respecting which the child is examined. A child describing any act or event may use language appropriate for a child of that age.

Counsel for the Department and Local Agency argues that a child under the age of ten is deemed to be a competent witness unless the court specifically finds that the child lacks the necessary capacity to remember or relate truthfully the facts about which the child is to be questioned. The Administrative Law Judge agrees. In her initial filing, the Licensee/Respondent asserts that the statute presumes that any child under the age of ten is an incompetent witness. The Administrative Law Judge does not agree. As noted in the Department/Local Agency's Response, any decision relative to the competency of the testimony of J.R. will not be made until such time as the Administrative Law Judge has the opportunity to examine the witness, or observe the witness in a testimonial situation, after which the Judge will make an independent determination as to whether the child has the capacity to remember and to relate truthfully the facts surrounding the incident which is the subject matter of this proceeding. The Judge's opinion as to the child's competency as a witness cannot be accomplished at this stage of the proceedings. The ALJ will have to observe the child, his actions, his mannerisms, and overall responses in order to make a judgment, based on the totality of such observations, about the child's competency.

Therefore, Part 2 of the Licensee/Respondent's Motion to Exclude is denied.

Regarding the admissibility of the tape-recorded statement of J.R., and the typed transcript of that statement, both from an interview conducted on July 17, 2007, the Licensee/Respondent's Motion to Exclude is also denied. The tape recording and transcript are admitted because they represent a significantly more contemporaneous statement by J.R. regarding the event in question than he will be able to offer at the hearing on August 18, 2008. And, since counsel for the Department and Local Agency intends to call J.R. as a witness, the child's prior statement is not hearsay, because he will be present to be questioned about the statement.

It is argued by the Licensee that the child's statement is not reliable because the interview in which the statement was made did not follow the necessary protocols for interviewing child witnesses, and that the questioning of the child was highly suggestive. In support, the Licensee/Respondent offers the Affidavit of Linda L. Marshall, PhD, a Licensed Psychologist who is experienced in psychological testing, diagnosis and treatment of mental illness and chemical dependency. Dr. Marshall states in her Affidavit that she is experienced in dealing with issues of allegations made by children, is familiar with literature on the subject of child witnesses and forensic interviewing techniques, and is aware of the importance of effective protocols in the methods of interviewing children so that the information gleaned in such interviews is accurate. She notes also that children at an early age can be highly suggestible if proper protocols and interview techniques are not followed.

Based on her reading of the statement of J.R., and listening to the tape recording of the interview, Dr. Marshall offers her opinion that the interview of the child did not

follow the necessary protocols for interviewing children of that age and that the statements in the interview are highly questionable, given the delay in time between the incident and the interview and the likelihood (she believes) that the child had discussed the matter with his parents prior to the interview.

In response, counsel for the Department and the Local Agency notes that the interview was conducted in the course of the interviewer's employment, in accordance with training the interviewer had received from Corner House. He notes that the Administrative Law Judge should be able to determine, after hearing testimony as to the interviewer's training and her reason for conducting the interview as she did, whether it was conducted in accordance with proper protocols and in accordance with the training that she received. The interviewer also will be made available for cross-examination by counsel for the Licensee/Respondent, after which the Judge should be able to assess whether the interview process tainted the statement made by the child in any way.

Similarly, if the Licensee/Respondent's expert is called as a witness, counsel for the Department and Local Agency will have the opportunity to cross-examine Dr. Marshall on the basis for the opinions stated in her Affidavit, which the Administrative Law Judge will then take into consideration. The Judge is unable to accept Dr. Marshall's conclusions regarding the interview process without allowing an opportunity for cross-examination by counsel for the Department/Local Agency.

The Administrative Law Judge concludes that it would be inappropriate to exclude the tape-recorded statement of J.R., or the typed transcript of the same statement, until the appropriate witnesses testify and have the opportunity to be cross-examined.

Therefore, Part 1 of the Licensee/Respondent's Motion to Exclude is denied.

R.C.L.